



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: MARCH 27, 2023

IN THE MATTER OF:

Appeal Board No. 627666

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determination holding the claimant ineligible to receive benefits, effective May 30, 2022, on the basis that the claimant was not totally unemployed. The claimant requested a hearing. The Commissioner of Labor objected that the hearing request was not made within the time allowed by statute.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the Commissioner of Labor. By decision filed January 11, 2023 (A.L.J. Case No.), the Administrative Law Judge sustained the Commissioner of Labor's timeliness objection and continued in effect the initial determination.

The claimant appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: FINDINGS OF FACT: The Notice of Determination was mailed to the claimant on August 2, 2022. The claimant received the determination but does not recall when, because she does not check her mailbox for weeks at a time. The determination contained instructions that if the claimant disagreed with the determination, she had a right to a hearing but must request it within 30 days from the date that the determination was mailed. The claimant did not read this information.

Since the age of 14, the claimant has suffered from depression and dysthymia.

During the period of August 2, 2022 through October 21, 2022, the claimant felt that she was not functioning as well as usual and slept a lot; however, she was not hospitalized and was able to continue to perform services for her yoga and realty businesses. She also applied for retail jobs in her area during this period. The claimant requested a hearing on October 21, 2022.

OPINION: Pursuant to Labor Law Section 620 (1) (a), a claimant who is dissatisfied with an initial determination of the claim for benefits may, within thirty days after the mailing or personal delivery of notice of such determination, request a hearing. The Administrative Law Judge may extend the time fixed for requesting a hearing, upon evidence that the physical condition or mental incapacity of the claimant prevented the filing of such request within thirty days of the initial determination. The regulations of the Appeal Board provide that a hearing request will be deemed to have been made timely if the request is postmarked within 30 days of receipt of the determination. Absent any proof to the contrary, a determination shall be held to have been mailed on the date recited on the determination and received five business days after the mailing of the determination. (12 NYCRR 461.1)

The credible evidence establishes that the claimant's request for hearing was untimely. We note that she has provided contradictory testimony regarding her receipt of the determination. The claimant initially testified that she received and opened it but does not know when. She later asserted that she may have received it after the 30-day period had expired; then contended that she only learned of it when she contacted the Department of Labor on October 21, 2022; and lastly, testified that she does not remember receiving it at all. On appeal, the claimant now contends that she was pet-sitting in Williamsburg in August and September of 2022 and, if she had received the determination during that time, she would have requested a hearing immediately.

In light of the foregoing inconsistencies, we accept the claimant's initial testimony that she received the initial determination but does not remember when. Under these circumstances, she is deemed to have received it by August 9, 2022, five business days after its mail date, and had until September 8, 2022 to make a timely request for a hearing. We note the claimant's admission that she did not read the instructions regarding hearing requests and find insufficient evidence of any physical or mental incapacity that prevented her from requesting a hearing by September 8, 2022, further noting that she was able to perform work and seek new employment during this time.

However, as the determination in this matter is an ongoing one with no finite end, the claimant's request for a hearing is deemed to be timely as September 21, 2022, the beginning of the 30-day period that preceded it. The timeliness objection therefore is sustained through September 20, 2022, only, and the initial determination continued in effect from May 30, 2022 through September 20, 2022. The merits of the determination as of September 21, 2022 must now be reviewed. Because no testimony or evidence was taken with respect to whether the claimant was totally unemployed as of September 21, 2022, the case should be remanded to hold a further hearing on this issue.

DECISION: The decision of the Administrative Law Judge, insofar as it sustained the Commissioner of Labor's timeliness objection and continued in effect the initial determination, is modified as follows and, as so modified, is affirmed.

The Commissioner of Labor's timeliness objection is sustained through September 20, 2022, only.

The initial determination, holding the claimant ineligible to receive benefits, effective May 30, 2022, on the basis that the claimant was not totally unemployed is continued in effect from May 30, 2022 through September 20, 2022, only.

The decision of the Administrative Law Judge, insofar as it continued in effect the initial determination holding the claimant ineligible to receive benefits on the basis that the claimant was not totally unemployed after September 20, 2022, is rescinded.

Now, based on all of the foregoing, it is

ORDERED, that the case shall be, and the same hereby is, remanded to the Hearing Section to hold a hearing, upon due notice to all parties and their representatives; and it is further

ORDERED, that the Notice of Hearing shall identify as the Purpose of Hearing the remanded issue of a lack of total unemployment effective September 21, 2022, only; and it is further

ORDERED, that the hearing shall be conducted so that there has been an opportunity for the above action to be taken, and so that at the end of the

hearing all parties will have had a full and fair opportunity to be heard; and it is further

ORDERED, that an Administrative Law Judge shall render a new decision, on the remanded issue only, which shall be based on the entire record in this case, including the testimony and other evidence from the original and the remand hearings, and which shall contain appropriate findings of fact and conclusions of law.

RANDALL T. DOUGLAS, MEMBER